87-1348

No. 87-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a court may enter an interlocutory injunction against a unilateral change by a carrier, allegedly in violation of the "status quo" requirements of the Railway Labor Act, before a trial on the merits with respect to disputed issues of fact, without "balancing the equities"—*i.e.*, without determining (1) that emergency injunctive relief is necessary to prevent irreparable injury to the plaintiff before the trial on the merits, and (2) that any such injury outweighs injury to the public or the carrier that will result from granting the injunction.

LIST OF PARTIES

In addition to the parties listed in the caption to this petition, the Chicago & North Western System Federation of respondent Brotherhood of Maintenance of Way Employes was a party to the proceedings below.

Petitioner Chicago and North Western Transportation Company is a wholly-owned subsidiary of the Chicago and North Western Corporation. Petitioner's subsidiaries and affiliates, apart from wholly-owned subsidiaries, are:

Iowa Transfer Railway Company

Kansas City Terminal Railway Company

MT Properties, Inc.

Peoria & Pekin Union Railway Company

Trailer Train Company

Transportation Data Exchange, Inc.

ACE Limited

Railroad Association Insurance, Ltd.

Transportation & Railroad Assurance Company, Ltd.

TQGroup

West Parcel Venture

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Petitioner Chicago and North Western Transportation Company respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 827 F.2d 330 (8th Cir. 1987). Its order denying rehearing (App. 26a) is unreported. The bench ruling and order of the district court granting a preliminary injunction (App. 14a, 20a) are unreported. The district court's opinion denying reconsideration of its ruling on the preliminary injunction (App. 22a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. 25a) was entered on August 25, 1987. A timely petition for rehearing was denied on November 13, 1987. (App. 26a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 Seventh of the Railway Labor Act, 45 U.S.C. § 152 Seventh, provides:

> "*Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden.* No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 6 of the Railway Labor Act, 45 U.S.C. § 156, provides:

> "*Procedure in Changing Rates of Pay, Rules and Working Conditions.* Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of con-

ferences without request for or proffer of the services of the Mediation Board."

STATEMENT

This case concerns the requisites for emergency injunctive relief in suits alleging Railway Labor Act violations.

Respondent Brotherhood of Maintenance of Way Employes ("BMWE") commenced this action against petitioner Chicago and North Western Transportation Company ("C&NW") in federal court in the District of Minnesota. BMWE is the collective bargaining representative of the C&NW's track maintenance employees. It alleged that C&NW had violated "status quo" obligations under §§ 2 Seventh and 6 of the Railway Labor Act, 45 U.S.C. § 152 Seventh and 156, by unilaterally amending company "Rule G" in 1986 to provide expressly that railroad employees were prohibited from drug offenses while on or off duty.[1]

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[1] On April 27, 1986, C&NW amended Rule G to provide as follows:

"Employes subject to call for duty, reporting for duty, on duty or on Company property are prohibited from using or being under the influence of alcoholic beverages or intoxicants. Possession of alcoholic beverages or intoxicants is prohibited while on duty or on Company property.

Employes shall not report for duty, be on Company property or be on duty under the influence of, or use while on duty or on Company property any drug or other substance that may in any way adversely affect their alertness, coordination reaction, response or safety. This prohibition includes prescription medications.

The illegal use, illegal possession or illegal sale of any drug by employes while on or off duty is prohibited." (Eighth Circuit Joint Appendix ["J.A."] 30.)

Prior to the amendment the rule did not contain the language in the third paragraph, which expressly prohibits illegal *off*-duty drug-related activities. (J.A. 29.)

The union moved for a preliminary injunction against enforcement of the amended rule, and the railroad moved to dismiss. The railroad argued that the amendment to Rule G was at least arguably authorized by its established past practices, and thus that the union's challenge to the amendment presented at most a "minor" dispute over the interpretation of those practices.[2] The union's motion was not supported by any affidavits. The railroad's motion was supported by an affidavit by its Vice President of Labor Relations, who stated that rules governing employee abuse of drugs and alcohol had been unilaterally issued and implemented by the railroad since at least as early as 1910, and that Rule G and its predecessors had been unilaterally amended by the railroad on at least five occasions since then, in 1929, 1953, 1967, 1975 and 1980. (J.A. 19-21.) Copies of these different versions of the rule attached to the affidavit showed that the 1910 and 1929 versions provided that "the frequenting of places where [intoxicants] are sold, is sufficient cause for dismissal" (J.A. 24, 25), and that while the "frequenting" provision was not contained in the 1953 version of the rule, the rule since 1953 had prohibited the use of intoxicants or narcotics by employees "subject to duty" or "subject to call for duty." (J.A. 26, 27, 30.) [3]

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[2] Under the Railway Labor Act "minor disputes" over the application or interpretation of collective bargaining agreements or matters "omitted" from formal agreements but governed by established relations between carriers and their employees are distinguished from "major disputes" over proposed changes in collective bargaining agreements. See, *e.g.*, *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723 (1945); *Railway Labor Executives' Ass'n* v. *Norfolk & W. Ry.*, 833 F.2d 700, 705 & n.4 (7th Cir. 1987); see 45 U.S.C. § 153 First(i). The courts lack jurisdiction over minor disputes because such disputes are committed to mandatory arbitration before adjustment boards established under § 3. See, *e.g.*, *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978).

[3] Employees who are off duty but may be called are "subject to duty." Furloughed employees are not subject to duty.

The district court heard argument from the union on August 14, 1986 and from both parties on September 23, 1986. (J.A. 35, 48-53, 61.) At the September 23 proceedings, in response to questions by the court as to whether the railroad had regulated off-duty drug offenses prior to 1986, the railroad's attorneys advised the court that it had done so under the "conduct unbecoming" rule,[4] and called the court's attention to a 1984 decision (3d Div. Award No. 25032) of the National Railroad Adjustment Board under § 3 of the Railway Labor Act, 45 U.S.C. § 153 First(i), sustaining the dismissal of a C&NW employee for off-duty sales of drugs. (J.A. 74-76; App. 27a.)

During the September 23 proceedings the union confirmed that the court had copies of Rule G in effect before and after the April 1986 amendment and a copy of a letter from BMWE to C&NW dated May 27, 1986, protesting the change in the rule.[5] (J.A. 63, 89-90; App. 15a.) The union presented no other evidence to the court. Counsel for the union offered to present evidence, stating:

> "Your Honor, you can't have an injunction hearing without some testimony. I mean, there is no factual basis at this point in time."

Counsel dropped the request, however, when the court responded: "As we used to say, watch me." (Transcript

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[4] Rule 7, known as the "conduct unbecoming" rule, provided:

> "Employes are prohibited from being careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious or conducting themselves in such a manner that the railroad will be subjected to criticism and loss of good will, or not meeting their personal obligations." (App. 10a n.3.)

[5] The union had also attached to its reply to the railroad's motion to dismiss the record of the disciplinary proceeding of Michael White, an employee who had been discharged following his arrest for off-duty drug sales. The court ordered White reinstated with back pay, and refused to stay that order pending the appeal below. (App. 21a, J.A. 118.)

of September 23, 1986 Preliminary Injunction Hearing, p. 6.)

After the argument the court granted the motion for a preliminary injunction from the bench, enjoining the railroad from enforcing the amended rule, and denied the railroad's motion to dismiss. (App. 15a, 18a-19a, 21a.) The court found that "although Rule G is not part of a collective bargaining agreement," it had regulated "employee intoxicant use * * * for a sufficient period of time with the knowledge and acquiescence of both the company and the union to become in reality a demonstrable part of the actual working conditions," citing *Shore Line* v. *Transportation Union*, 396 U.S. 142, 143 (1969). (App. 17a.) The court further found that "[s]ince 1910 the railroad has unilaterally regulated employees' intoxicant use * * * under Rule G." The court nevertheless asserted (notwithstanding N.R.A.B. 3d Div. Award No. 25032 and the express provisions of the different versions of Rule G described above) that the "railroad has never regulated the off-duty conduct of an employee while away from company property until the change in Rule G, which it unilaterally promulgated [in] April 1986." (App. 17a.) Therefore, the court concluded, Rule G, "prior to its change in April of 1986, constitutes the status quo regarding the company's regulation of employee intoxicant use," and that version of Rule G could not be changed by the railroad unless it first exhausted Railway Labor Act major dispute procedures with respect to a proposal to change the rule. (App. 18a.)

The court's order did not purport to make any determination as to the balance of the equities. The court did not undertake any inquiry as to whether BMWE or its members would suffer irreparable injury if the railroad was not enjoined pending a trial on the merits. Nor did it consider whether any such injury outweighed injury that the public or the railroad might suffer if an inter-

locutory injunction was granted and it later turned out at the trial on the merits that the union's claims were unfounded. (App. 14a-21a.)

The railroad moved for reconsideration, filing a further affidavit by its Vice President of Labor Relations that sought to show that it had in fact engaged in extensive regulation of off-duty conduct, including off-duty drug offenses, prior to the 1986 amendment of Rule G, under a number of unilateral company safety and operating rules, particularly Rule 7.[6] (J.A. 78-87.) The court denied the motion, however, on the ground that facts regarding the practice under other rules had not been before it *when it granted the preliminary injunction*:

> "In its reconsideration motion, the railroad fervently argues that it has traditionally regulated off-duty conduct through Rule 7, known as the "conduct unbecoming" rule, as well as through various other company rules. * * * [O]nly Rule G was before this court when considering the underlying motion for a preliminary injunction * * *." (App. 24a.)

On appeal, the Eighth Circuit affirmed. The railroad contended that the district court erred in granting the preliminary injunction in the absence of any showing of irreparable harm to the plaintiff or determination that the balance of the equities favored the union. The railroad called the court's attention to *Local 553, Transport Workers* v. *Eastern Air Lines*, 695 F.2d 668, 677 (2d Cir. 1982), in which the Second Circuit had held that while there was uncertainty about the showing required for a *permanent* injunction in a Railway Labor Act status quo case *following* a trial on the merits, there is "no doubt that a finding of irreparable harm [is] necessary" where a *preliminary* injunction is sought in such a

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[6] The affidavit noted two instances in which employees had been discharged for off-duty drug offenses, as well as several instances of discharge for other off-duty criminal conduct, *e.g.*, theft, rape, and passing bad checks. (J.A. 80-81.)

case; the very purpose of interlocutory injunctive relief is to prevent irreparable harm to the plaintiff outweighing the interests of the public and the defendant until a trial can be had. The Eighth Circuit rejected that contention, however, holding that such an injunction "may issue without regard to the usual balancing of the equities * * *." (App. 5a, n.2.)

The further holdings of the court of appeals serve to emphasize the provisional nature of the factual foundation for the preliminary injunction. The railroad contended that the district court's finding that the "railroad has never regulated the off-duty conduct of an employee while away from company property" was clearly erroneous, because the union had not presented evidence, and the railroad's evidence, including N.R.A.B. 3d Div. Award No. 25032, was to the contrary. The Eighth Circuit rejected that contention, however, stating that "although the parties will have the right to supplement the record in any further proceedings with respect to past practice under Rule 7, on the basis of the record before it *at the time it granted the preliminary injunction*" the district court's determination was not clearly erroneous. (App. 10a, 11a n.4 (emphasis added)).

The court of appeals rested its holding on the merits on that provisional foundation. The court rejected the railroad's contention that the controversy over the amendment to Rule G was a minor dispute, because in the court's view the district court's findings—that Rule G, although not a part of the collective bargaining agreement, had regulated employee intoxicant use since 1910, but the railroad had "never" before regulated off-duty conduct—"elevated [the supposed practice under Rule G prior to the April amendment] to an implied term of the collective bargaining agreement," so that the railroad's amendment gave rise to a major dispute. (App. 3a, 7a.) The court thus rested its legal conclusion entirely on a factual predicate that it recognized had not yet been

finally established, and that will be vigorously contested when this case is tried on the merits.

REASONS FOR GRANTING THE WRIT

This case presents an important issue, as to which there is a direct conflict between the Second Circuit and the court below, regarding the requisites for interlocutory injunctive relief in Railway Labor Act status quo cases prior to the trial on the merits of the underlying factual issues.

1. The court below held squarely, in a case in which the underlying factual issues are hotly disputed, that in a suit to enjoin an alleged violation of the status quo requirements of the Railway Labor Act, a preliminary injunction "may issue without regard to the usual balancing of the equities" (App. 5a n.2.). Indeed, according to respondent, the court below held that in such a case, if the district court's preliminary view of the merits supports the plaintiff, an "injunction is *mandatory* without consideration of the equities." [7]

That holding is directly in conflict with *Local 553, Transport Workers* v. *Eastern Air Lines*, 695 F.2d 668 (2d Cir. 1982). In that case, the district court granted a preliminary injunction under § 6 of the Railway Labor Act, finding, as the district court did here, that the union was likely to succeed on the merits of its claim that the carrier's actions constituted a unilateral change in the status quo. The Second Circuit affirmed that aspect of the decision, but then went on to consider whether "the District Court was entitled to find Local 553's showing of irreparable harm sufficient to support a preliminary injunction * * *." 695 F.2d at 677. Noting that "there is some question whether a showing of irreparable harm is even necessary before enjoining a carrier in a major

[7] Appellees' Response to Suggestion for Rehearing En Banc, p. 2.

dispute," the court squarely held that "because the District Court was ordering a preliminary injunction rather than a final injunction, there is no doubt that a finding of irreparable harm was necessary." *Id.* at 677, 679 n.11.[8] In short, the Second Circuit held that the traditional equitable criteria governing injunctive relief *pendente lite* are applicable in Railway Labor Act status quo cases. The court then went on to vacate aspects of the preliminary injunction that were not necessary to prevent irreparable injury during the period prior to trial and affirmed the injunction as modified. *Id.* at 677-78, 679-80. Thus the decision below is squarely in conflict with the decision of the Second Circuit in the *Eastern Air Lines* case.

2. The decision below is contrary to fundamental principles of equity jurisprudence.

a. The decision below is at war with the fundamental purpose of an interlocutory injunction: to prevent ir-

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[8] The district court in the *Eastern Air Lines* case had quoted from a decision of the District of Columbia Circuit holding that "a showing of irreparable harm is not required before [a *permanent*] status quo injunction may issue, particularly because the question before us is concerned with far more than the private rights and duties of the parties." *Southern Ry.* v. *Brotherhood of Locomotive Firemen & Enginemen*, 337 F.2d 127, 133-34 (D.C. Cir. 1964), quoted in *Local 553, Transport Workers* v. *Eastern Air Lines*, 544 F. Supp. 1315, 1327 (E.D.N.Y. 1982). The basis for that rule, however, is that once it has been established that a major dispute exists, the statutory policy favoring "peaceful settlement" of such disputes supersedes the private interests of the parties. *Southern Ry.*, 337 F.2d at 133-34. In such a case maintenance of the status quo is obligatory to prevent "the union from striking and management from doing anything that would justify a strike." *Shore Line* v. *Transportation Union, supra*, 396 U.S. at 150. But, as the Second Circuit recognized in *Eastern Air Lines*, that rationale does not extend to the *preliminary* injunction context, where it has not yet been established that a major dispute that could culminate in a strike exists, or that the railroad's actions would frustrate the ultimate resolution of any such dispute.

reparable harm until the case can be tried on the merits. An interlocutory injunction

> "is a drastic procedure. It is a temporary remedy allowed at a time when the parties have not had full opportunity to present their case to the court, nor has the court, conversely, had the benefit of a full trial and deliberation."

International Ass'n of Machinists v. *Eastern Air Lines*, 826 F.2d 1141, 1144 (1st Cir. 1987).[9]

The only justification for such an injunction, therefore, is to preserve the "relative positions of the parties until a trial on the merits can be held." *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981); *Granny Goose Foods, Inc.* v. *Teamsters*, 415 U.S. 423, 434-35 (1974). Its purpose is "to preserve the court's ability to render a meaningful decision on the merits." *Canal Authority* v. *Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).[10]

Accordingly, this Court has held repeatedly that the very basis for the entry of interlocutory injunctions "has always been irreparable harm and inadequacy of legal

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[9] *Accord, Canal Authority* v. *Callaway*, 489 F.2d 567, 573 (5th Cir. 1974); *Pan American World Airways* v. *Flight Engineers Ass'n*, 306 F.2d 840, 843 (2d Cir. 1962).

[10] *Accord, Houghton* v. *Meyer*, 208 U.S. 149, 156 (1908) (construing statutory predecessor to Federal Rule of Civil Procedure 65); *Toledo, A.A. & N.M. Ry.* v. *Pennsylvania Co.*, 54 F. 730, 741 (C.C. N.D. Ohio) (Taft, J.), *appeal dismissed sub nom. In re Lennon*, 150 U.S. 393 (1893); *Tri-State Generation & Transmission Ass'n* v. *Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986); *United States* v. *Adler's Creamery*, 107 F.2d 987, 990 (2d Cir. 1939); *American Mercury* v. *Kiely*, 19 F.2d 295, 297 (2d Cir. 1927); *Love* v. *Atchison T. & S.F. Ry.*, 185 F. 321, 331 (8th Cir. 1911). See 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2947 at 424 (1973); Note, *Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction*, 71 Colum. L. Rev. 165 (1971); *Developments in the Law: Injunctions*, 78 Harv. L. Rev. 994, 1056 (1965).

remedies,"[11] and has therefore rejected suggestions that at the interlocutory injunction "stage the District Court need not [conclude] that there was actual irreparable injury." *Sampson* v. *Murray*, 415 U.S. 61, 88 (1974) (citations omitted). *Accord*, *Amoco Production Co.* v. *Village of Gambell, Alaska*, 107 S. Ct. 1396, 1402 (1987).

b. Further, the decision below nullifies the established principle of equity jurisprudence that even when the plaintiff *can* show that it will be injured irreparably during the period preceding trial, the court nevertheless may deny an interlocutory injunction in the exercise of sound equitable discretion unless the threatened injury to the plaintiff outweighs injuries to other parties and the public interest that may result from a grant of an injunction *pendente lite*. As this Court has held, "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). Accordingly,

> "The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. * * * Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.
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> * * * But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot

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[11] See *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Brown* v. *Chote*, 411 U.S. 452, 456 (1973); *Public Serv. Comm'n* v. *Wisconsin Tel. Co.*, 289 U.S. 67, 70-71 (1933); *Ohio Oil* v. *Conway*, 279 U.S. 813, 815 (1929) (*per curiam*); *Houghton* v. *Meyer*, *supra*, 208 U.S. at 156.

compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. * * * This is but another application of the principle, declared in *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515, 552, that 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Yakus* v. *United States*, 321 U.S. 414, 440-41 (1944) (internal citations omitted).[12]

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[12] These equitable concerns have led virtually all of the courts of appeals, including the Eighth Circuit, to hold that the district courts' exercise of their power to grant injunctive relief *pendente lite* must be conditioned upon consideration of "four factors": "(1) whether there is a substantial probability movant will succeed at trial; (2) whether the moving party will suffer irreparable injury absent the injunction; (3) the harm to other interested parties if the relief is granted; and (4) the effect on the public interest." *Dataphase Systems, Inc.* v. *C L Systems, Inc.*, 640 F.2d 109, 112 (8th Cir. 1981). Accord *Foltz* v. *U.S. News & World Report*, 760 F.2d 1300, 1305 (D.C. Cir. 1985); *Planned Parenthood League of Massachusetts* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981); *Punnet* v. *Carter*, 621 F.2d 578, 582 (3d Cir. 1980); *North Carolina State Ports Authority* v. *Dart Containerline Co.*, 592 F.2d 749, 750 (4th Cir. 1979); *Canal Authority* v. *Callaway*, *supra*, 489 F.2d at 572 (5th Cir. 1974); *Black Law Enforcement Officers Ass'n* v. *City of Akron*, 824 F.2d 475, 479 (6th Cir. 1987); *Roland Machinery Co.* v. *Dresser Industries, Inc.*, 749 F.2d 380, 382-83 (7th Cir. 1984); *Los Angeles Memorial Coliseum Comm'n* v. *National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980); *Tri-State Generation & Transmission Ass'n* v. *Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986); *Shatel Corp.* v. *Mao Ta Lumber & Yacht Corp.*, 697 F.2d 1352, 1354-55 (11th Cir. 1983). See also *Stormy Clime Ltd.* v. *Progroup, Inc.*, 809 F.2d 971, 973 (2d Cir. 1987) ("[A] party seeking a preliminary injunction must establish both possible irreparable injury and either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor.").

3. There is no provision in the Railway Labor Act that deals with injunctive relief, much less that suggests that Congress intended to allow injunctions before trial without regard to the necessity of such relief. The decision below therefore cannot be reconciled with this Court's decisions that "such a major departure" from "the requirements of equity practice with a background of several hundred years of history" is not to be "lightly" assumed,[13] and that the Railway Labor Act does not limit the traditional equitable powers of courts.[14]

a. Just this past term this Court reversed a Ninth Circuit holding that a preliminary injunction against a threatened violation of an environmental statute should be granted without consideration of the traditional equitable factors:

> "'[T]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of the law. * * * Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles * * * [u]nless a statute in so many words or by a necessary and inescapable inference, restricts the court's jurisdiction in equity * * *.'" *Amoco Production Co., supra*, 107 S. Ct. at 1402-03.[15]

b. Moreover, in *Locomotive Engineers* v. *Missouri-K.-T. R. Co.*, 363 U.S. 528 (1960), this Court held that the Railway Labor Act does not deprive courts enforcing

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[13] *Hecht Co.* v. *Bowles, supra*, 321 U.S. at 329-30; *Amoco Production Co., supra*, 107 S. Ct. at 1403.

[14] *Locomotive Engineers* v. *Missouri-K.-T. R. Co.*, 363 U.S. 528 (1960).

[15] Quoting *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) (internal citations omitted).

the Act of their traditional equitable powers, and that courts could impose traditional equitable conditions on injunctions against strikes over minor disputes subject to arbitration under the Act. The Court stated that this Act "contains no express provisions circumscribing the equitable powers of the court," and laid down the rule that the courts are presumed to retain "the power to * * * ensure that extraordinary equitable remedies will not become the engines of injustice," unless it can be shown by "clear implication" from a particular provision that Congress intended to "truncate" that power. 363 U.S. at 531-32.

c. No such "clear implication" can be gleaned from the status quo provisions of the Railway Labor Act.[16] Indeed, the Act says nothing about injunctive relief. Congress omitted any such reference precisely because it wished to leave the courts free to exercise their traditional remedial powers flexibly to suit the needs of particular cases. *Chicago & N.W. R. Co.* v. *Transportation Union*, 402 U.S. 570, 577 (1971). Courts called upon to enforce the Act by interlocutory injunction accordingly may exercise traditional equitable powers, and have no warrant to nullify the very considerations that are the basis for the exercise of these powers.

4. The issue is of great importance to the railroad and airline industries,[17] warranting this Court's attention.

a. Our survey of the federal reporters and labor services shows that in recent years unions have called upon

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[16] These include, in addition to § 6, the provisions in §§ 5 First and 10 for the mediation and emergency board phases of a major dispute. 45 U.S.C. §§ 155 First, 160. These status quo provisions are all "identical" in their purpose and effect. *Shore Line, supra*, 396 U.S. at 152.

[17] Air carriers are subject to the Railway Labor Act and thus to the same status quo obligations as railroads are. 45 U.S.C. § 181.

the federal courts in dozens of cases each year seeking relief for alleged Railway Labor Act status quo violations by rail or air carriers. Federal courts have enough to do without the burden of preliminary injunction applications by such plaintiffs who cannot show that they will be harmed irreparably during the period prior to trial if such an injunction is not granted.

b. More fundamentally, the mechanical grant of interlocutory injunctions before a trial has established the facts regarding claimed violations of the Railway Labor Act, without regard to the balance of harms and the very purpose of such injunctions, will do serious and far-reaching mischief; it will cause at least as much irreparable harm as it prevents. This case illustrates the matter.

For the past year and a half the railroad has been enjoined from implementing a rule that, as the record showed, was part of a code of operating and safety rules placed into effect by the railroad, in accordance with established custom and practice throughout the railroad industry, to ensure that it will be able to fulfill its statutory duties under the Interstate Commerce and Federal Railroad Safety Acts to conduct safe operations.[18] (J.A. 21-22.) The Department of Transportation and the Federal Railroad Administration have consistently recognized that drug abuse by rail and airline employees poses a grave threat to safe transportation operations. 49 C.F.R. § 219.1(a); *Airline and Rail Service Protection Act of 1987: Hearing Before the Senate Committee on Commerce, Science & Transportation*, 100th Cong., 1st Sess. 21 (1987) (Statement of Hon. Elizabeth Dole, Secretary of Transportation). Indeed, these agencies and members of Congress have recently called for more stringent regulation of drug abuse by carrier employees, in the wake of the deaths and injuries caused by the

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[18] See 49 U.S.C. § 11101(a); 45 U.S.C. §§ 431(a), 438.

catastrophic drug-related Amtrak/ConRail crash at Chase, Maryland in January 1987, *while this case was pending*. See *id.*; *Rail Safety: Hearing Before the Subcommittee on Commerce, Science & Transportation*, 100th Cong., 1st Sess. 1-4 (1987) (Statements of Senators Exon, Rockefeller, Danforth, and Pressler); *id.* at 23-24 (Statement of Hon. John Riley, Administrator, Federal Railroad Administration); *id.* at 51 (Statement of Hon. James Burnett, Chairman, National Transportation Safety Board). The district court in this case recognized that the safety concerns that led the railroad to amend Rule G in April 1986 were "matters of much grav[i]ty." (App. 14a.) Yet the court below deemed irrelevant the railroad's contention that the risk of drug-related accidents might increase if it were enjoined from implementing a rule designed to eliminate the possibility that any of its employees would come to work under the influence of illegal drugs.

The decision below leaves the public interest out of consideration. Yet it is not required to prevent irreparable harm to employees. They will be protected, through an award of backpay if necessary, if a full hearing on the merits shows that a carrier has unlawfully changed the status quo.[19] If, on the other hand, a union's complaint turns out to present a minor dispute subject to arbitration by an adjustment board, that board can order a full make-whole remedy. See 45 U.S.C. § 153 First(o).

The Eighth Circuit rule factoring out of the interlocutory injunction calculus any consideration of carrier and public concerns such as the safety issues in this case, even where no injunction is needed to safeguard employee rights *pendente lite*, will have grave and substantial effects on carriers and the public that they serve. Thus,

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[19] See, *e.g.*, *United Industrial Workers* v. *Board of Trustees of the Galveston Wharves*, 400 F.2d 320, 323 (5th Cir. 1968).

the question whether the status quo requirements of the Railway Labor Act are among those rare statutory provisions that curb the equitable jurisdiction of the federal courts to withhold preliminary injunctive relief where the interests of the public or the defendant overwhelmingly disfavor it is an important one warranting review by this Court. The conflict between the Second Circuit and the court below should be resolved.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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February 11, 1988

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5403

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, and CHICAGO AND NORTH WESTERN SYSTEM FEDERATION, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Appellees,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Appellant.

Appeal from the United States District Court
for the District of Minnesota

Submitted: January 15, 1987
Filed: August 25, 1987

Before LAY, Chief Judge, and HEANEY and ARNOLD, Circuit Judges.

HEANEY, Circuit Judge.

The Chicago & Northwestern Transportation Company (CNW) appeals an order of the district court granting

the Brotherhood of Maintenance of Way Employees (BMWE) a preliminary injunction prohibiting enforcement of one of the CNW's employee rules subjecting employees to discipline for possession, use, or sale of illegal drugs while off duty until such time as the CNW complies with section 6 of the Railway Labor Act (RLA), 45 U.S.C. § 156.

I

On April 27, 1986, the CNW unilaterally implemented an amendment to its "Operating Rule G" (hereinafter Rule G) prohibiting use, possession or sale of any illegal drug by an employee while off duty. The BMWE informally protested the rule change. On June 17, 1986, Michael White, a BMWE member and CNW employee, was arrested for possession of marijuana. On June 20, 1986, White was informed that he was suspended from employment with the CNW. On July 22, 1986, before White had an opportunity to enter a plea in local court to the charges against him, the CNW held a hearing to determine whether he had violated Rule G. At the hearing, White vigorously denied the charges against him. Nonetheless, relying solely upon the criminal complaint in the matter, the CNW terminated White for violating Rule G on July 25, 1986.[1]

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[1] Aside from White's denial of the charges against him, the only evidence introduced at the hearing pertaining to the violation of Rule G is found in the testimony of Donald G. Mundth, inspector of police for the CNW who testified:

> Q. Mr. Mundth, in what way did you become involved in this incident?
>
> A. On Thursday, June 18, 1986, Mr. Terbell approached me and requested that I assist him in the investigation of an employee who was arrested at Mankato, Minnesota for possession of controlled substance. I told Mr. Terbell that I would follow up and investigate the matter.
>
> Q. In your follow-up did you have any contact with the local Civil Authorities here at Mankato?
>
> A. Yes, I did.

[Continued]

On July 28, 1987, the BMWE brought a motion in district court for a preliminary injunction prohibiting the CNW from enforcing Rule G until it had fully complied with the notice, negotiation, and mediation procedures of the RLA, 45 U.S.C. §§ 151-188. The BWME also sought to have White reinstated with back pay. After hearing arguments on the motion on August 14, 1986, and September 23, 1986, and considering affidavits and exhibits submitted by the parties, the district court granted the BMWE's motion in an oral ruling from the bench. The court found that although Rule G is not part of the written collective bargaining agreement of the parties, the knowledge and acquiescence of the parties over a long period of time in the rule has elevated it to an implied term of the collective bargaining agreement of the parties affecting the actual working conditions at the CNW. In addition, the court found that the amendment of Rule G represented a formal change in the agreement of the parties rather than a reinterpretation or application of the agreement. It concluded that the action represented a

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[1] [Continued]

Q. Did you discuss the charges against Mr. White with the Civil Authorities?

A. Yes, I did.

Q. And do you have any information of what these charges are?

A. Yes I do. Mr. Irwin, I have a copy of the District Court's Criminal Complaint which charges Mr. Michael Bruce White with various charges.

Q. Would you please, for the record, read what these charges are?

A. The Criminal Complaint consists of three pages. The first page establishing facts of the matter and determining what probable cause exists to make the charges. The second page is actually the page on which the charges are listed * * *.

* * * *

Q. Mr. Mundth * * * are these charges filed against Mr. White a violation of Rule G?

A. Yes, they are.

major dispute in which it was obliged to enter a status quo injunction pursuant to section 6 of the RLA, 45 U.S.C. § 156. Finally, as a result of the injunction requiring maintenance of the pre-amendment status quo, the court ordered White reinstated with back pay from the date of his discharge. The CNW appeals.

II

Relations between the BMWE and the CNW are governed by the RLA, 45 U.S.C. §§ 151-188. Under the RLA, both sides have an obligation to negotiate whenever a dispute arises. *See* 45 U.S.C. § 152 first and second. If such negotiations prove fruitless, the dispute may take one of two settlement routes depending upon whether it is a major or minor dispute. If a dispute is major, the parties must follow an "almost interminable process" beginning with the National Mediation Board. *See* 45 U.S.C. § 155; *Detroit and Toledo Shore Line R.R. Co. v. United Transportation Union*, 396 U.S. 142, 149 (1969). If, on the other hand, the dispute is minor, it must be submitted to arbitration by the National Railroad Adjustment Board. *See* 45 U.S.C. § 153. Additionally,

> [t]he question whether a dispute is major or minor determines the degree to which a federal court may become involved in the dispute. If the dispute is major, the courts have broad powers to enjoin unilateral action by either side in order to preserve the status quo while settlement procedures go forward. Such an injunction may issue without regard to the usual balancing of the equities. But if the dispute is only minor, the court's power is more limited since the NRAB has exclusive jurisdiction over such minor disputes. The traditional power to enjoin under equitable principles remains, but in the usual case it is inappropriate to exercise this power since irreparable loss and inadequacy of the legal remedy

> cannot plainly be shown until the NRAB has had an opportunity to act.

Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R. Co., 802 F.2d 1016, 1021 (8th Cir. 1986) (citations omitted).[2]

The terms major and minor dispute are not found in the RLA. Rather, major dispute is a shorthand term for a dispute falling under 45 U.S.C. § 156 which speaks of "change[s] in agreements affecting rates of pay, rules, or working conditions," and minor dispute is a shorthand term for a dispute falling under 45 U.S.C. § 153(i) which speaks of "disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."

Determining whether a dispute is major or minor is often a question of degree and turns upon the facts in each case. *Missouri Pacific Joint Protective Board v. Missouri Pacific R.R. Co.*, 730 F.2d 533, 536-37 (8th Cir. 1984). At base, the question is whether the dispute may be resolved by interpretation or application of the existing agreement of the parties. If so, it is a minor dispute. In contrast, if the dispute arises out of an area not contemplated by the agreement or arises because a party is seeking to change a term of the agreement, it is a major dispute. *See Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711, 723-24 (1945); *Brotherhood of Maintenance of Way Employees, Lodge 16*, 802 F.2d at 1021 n.3; *Independent Federation of Flight Attendants*

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[2] In its brief, the CNW contends that the district court erred as a matter of law in failing to engage in the traditional balancing of the equities prior to granting the injunction. As the quoted passage indicates, however, an injunction pursuant to 45 U.S.C. § 156 "may issue without regard to the usual balancing of the equities." *Brotherhood of Maintenance of Way Employees, Lodge 16*, 802 F.2d 1016, 1021 (8th Cir. 1986). Therefore, we reject the CNW's contention.

v. Trans World Airlines, Inc., 655 F.2d 155, 157-58 (8th Cir. 1981).

It is not, however, for the courts to interpret the agreement of the parties for the purpose of finally adjudicating a dispute between employees and the carrier. *See Order of Railway Conductors of America v. Pitney*, 326 U.S. 561, 564 (1946). The RLA clearly leaves this task to the National Railroad Adjustment Board. *See* 45 U.S.C. § 153(i). Thus, although for purposes of deciding whether a section 6 injunction should issue a court must first determine what the agreement of the parties is, *Brotherhood of Maintenance of Way Employees, Lodge 16*, 802 F.2d at 1022, this Court has held that a dispute must be considered minor and a status quo injunction should not ordinarily issue if the agreement of the parties is "reasonably susceptible" of the interpretations sought by both the employer and the employees. *Independent Federation of Flight Attendants*, 655 F.2d at 158. On review, questions as to the content of the agreement of the parties are factual, and may be reversed only if clearly erroneous, while the susceptibility of the interpretations of the agreement sought by the employer and the employees presents an issue of law.

III

In applying the RLA to the facts of this case, the district court found that although not part of the written collective bargaining agreement, Rule G has regulated employee intoxicant use for a sufficient period of time with the knowledge and acquiescence of the CNW and the BMWE to become part of the implied agreement of the parties. The CNW contends that this finding is clearly erroneous. In support of its contention, the CNW argues that its explicit collective bargaining agreement with the BMWE is completely silent on employee alcohol or drug use and that the effect of this silence is to commit the subject to its discretion. More specifically, the CNW

argues that the district court erroneously invoked section 6 of the RLA, 45 U.S.C. § 156, because

> [t]here is no * * * agreement between the parties—written or unwritten—concerning employee drug involvement, or illegal off duty conduct, since these subjects * * * historically have been left to C & NW as a matter of managerial prerogative.

CNW reply brief at 8-9.

We cannot, on the basis of the record before us, accept the CNW's argument. As this Court has recently stated:

> Since, as a practical matter, it is impossible for the written collective bargaining agreement to describe every possible permutation of working conditions which might arise, it is not unusual for the parties to a labor agreement to develop working relationships, customs, and practices which are understood to be the norm, but which are nowhere reduced to a formal contract term. When longstanding practice ripens into an established and recognized custom between the parties, it ought to be protected against sudden and unilateral change as though it were a part of the collective bargaining agreement itself.

Brotherhood of Maintenance of Way Employees, Lodge 16, 802 F.2d at 1022.

After reviewing the record existing at this stage in the case, we find that the district court did not err in holding that Rule G, by virtue of the parties' longstanding and recognized custom and practice, has become an implied term in the agreement of the parties.

Having found that Rule G constitutes an implied term in the agreement of the parties, it is necessary to determine whether the pre-amendment version of the parties' agreement (the implied term under the "old Rule G") is "reasonably susceptible" to being interpreted in a manner consistent with the post-amendment version (the implied term under the "new Rule G"). If the pre-amendment

version is reasonably susceptible to such an interpretation, the dispute is a minor one and an injunction should issue only in rare circumstances. *See Brotherhood of Maintenance of Way Employees, Lodge 16*, 802 F.2d at 1022; *Independent Federation of Flight Attendants v. Trans World Airlines*, 655 F.2d at 158.

In this respect, the district court held that, "[s]ince the grievances at issue grew out of a formal change to Rule G rather than out of an interpretation or application of that rule, the grievance is a major dispute." The CNW contends that this holding is erroneous. The CNW argues that the amendment to Rule G served only to make explicit that which was already prohibited by its operating Rule 7, the "conduct unbecoming rule." Although we recognize that the evidence on the issue is not as clear and complete as the parties may wish, the district court was correct in rejecting the CNW's argument with respect to Rule 7 on the basis of the evidence properly before it when it granted the preliminary injunction.

Determining the state of the record before the district court at the time it granted the motion for a preliminary injunction is difficult due to the procedural history of the case. On August 14, 1986, a hearing was held before the district court on the BMWE's motion for a preliminary injunction and the CNW's cross motion to dismiss. Both parties presented briefs in support of their motions. In its brief, the CNW referred to the conduct unbecoming rule but focused primarily on its right to unilaterally amend Rule G. In addition, the CNW presented an affidavit of Ronald Cuchna, vice president of labor relations for the CNW (8/1/86 affidavit). The affidavit made no mention of any past practice of regulating off duty employee drug use, possession, or sale under the conduct unbecoming rule. Attached to the affidavit were copies of portions of the CNW's past and present disciplinary rules depicting the evolution of Rule G and a copy of a board of adjustment decision in a dispute between Southern

Pacific Transportation Company and Brotherhood of Locomotive Engineers holding a rule similar to the amended Rule G applicable to off duty sale of drugs.

At the August hearing, the BMWE presented its argument in full to the court. Before the CNW could present its argument, however, the trial judge suggested that the remainder of the proceeding be stayed pending efforts by the parties to resolve their differences privately. On September 23, 1986, after efforts to settle the dispute failed, the hearing before the district court was resumed and the CNW presented its argument. Also at the September hearing, the BMWE offered to supplement the record with additional exhibits and live testimony. The trial judge refused the offer and granted the BMWE's motion for the preliminary injunction.

The CNW subsequently brought a motion urging the district court to reconsider its decision. Appended to that motion was another affidavit by Ronald Cuchna (9/29/86 affidavit) stating:

> The Rule G provisions, as promulgated by the C&NW on April 27, 1986, regarding the illegal use, possession or sale of drugs while on or off duty are merely a specification of General Rule 7 provisions which are applicable to employees of the C&NW. * * * General Rule 7 would also prohibit the conduct cited in the complaint concerning Mr. White.

The district court denied CNW's motion stating:

> In its reconsideration motion, the Railroad fervently argues that it has traditionally regulated employee off-duty conduct through Rule 7, known as the "conduct unbecoming" rule, as well as through various other company rules. It is clear, of course, that only Rule G was before this Court when considering the underlying motion for a preliminary injunction. Simply put, the propriety of the company's regula-

tion of off duty conduct by means other than Rule G is not at issue in this case.

Although the parties will have the right to supplement the record in any further proceedings with respect to past practice under Rule 7, on the basis of the record before it at the time it granted the preliminary injunction, we hold that the district court was correct in determining that Rule 7 was not at issue in the case. At the time the district court granted the injunction, the record did not reflect that the CNW applied Rule 7 and the amended Rule G in a manner that would suggest the two rules covered the same territory. On the contrary, several factors strongly suggested that this was not the case. First, the CNW had found it necessary to amend Rule G and to insist on the amendment despite strong opposition in the form of this action. If the two rules actually covered the same conduct in the same manner, it would be senseless for the CNW to waste time, energy and money attempting to enforce amended Rule G. Second, in the proceedings the CNW brought against him, White was only charged with violating Rule G and not Rule 7. If the rules are coextensive, one would think White would have been charged with violating both. Third, and most importantly, Rule 7, on its face, is limited to instances in which the employee's conduct has an adverse effect on the carrier, i.e., a loss of good will, potential danger to other employees, or reduced work performance.[3] Rule G is not so limited. In fact, White's case provides an example of the distinction. White was discharged solely on the basis of a criminal complaint. The CNW, by the

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[3] Rule 7, in its entirety, states:

> Employees are prohibited from being careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome, or otherwise vicious or conducting themselves in such a manner that the railroad will be subjected to criticism and loss of good will, or not meeting their personal obligations.

Affidavit of Ronald J. Cuchna dated September 29, 1986, exhibit 2.

terms of Rule G, did not have to show loss of good will, danger to other employees, or reduced job performance.

Alternatively, the CNW argues that Rule G is at most a minor change in the implicit agreement of the parties because the past practice of the parties, which itself is part of the implicit agreement of the parties, shows that the CNW always possessed the right to make unilateral changes in Rule G. In other words, the CNW contends that the agreement of the parties consists not only of the Rule G in effect at any given time, but also consists of the right of the CNW to change the rule unilaterally. The district court, in defining the status quo to be maintained during the preliminary injunction, rejected this position as unreasonable. It stated:

> Since 1910 the Railroad has unilaterally regulated employee's intoxicant use while on duty, subject to duty, or on company property, all under Rule G. The Railroad has never regulated the off duty conduct of an employee while away from company property until the change in Rule G, which it unilaterally promulgated in April 1986.

In support of its position, the CNW cites *United Transportation Union, Lodge No. 31 v. St. Paul Union Depot Co.*, 434 F.2d 220 (8th Cir. 1970), for the proposition that an implied term in a bargaining agreement may include the unilateral power to change the term.[4] What-

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[4] The CNW also argues that the district court's factual finding that "[t]he Railroad has never regulated the off duty conduct of an employee while away from company property until the change in Rule G" is clearly erroneous. We disagree. The statement must be taken in the light of the record before the court at the time it granted the preliminary injunction as well as in the context of the case. Clearly the court did not intend by the statement that the CNW had never before regulated off duty employee conduct in any way. Rather, in the context of the case, it is clear that the district court was considering only regulation of that off duty conduct that would be regulated under the amendment to Rule G, that is, off duty possession, use, or sale of illegal drugs. So understood, the district court's finding is not clearly erroneous.

ever the merit of the proposition, *St. Paul Union Depot* also requires that an implied term, "demonstrate not only a pattern of conduct but also some kind of mutual understanding, either express or implied." The case goes on to state that factors to consider in determining whether a past practice has become an implied term of a bargaining agreement are, "the mutual intent of the parties, their knowledge of and acquiescence in the prior acts, along with evidence whether there was joint participation in the prior course of conduct, all to be weighed with the facts and circumstances in the perspective of the present dispute." *Id.* at 223.

Common sense and this Court's prior cases indicate that there are limits on the extent to which the CNW may amend Rule G consistent with the history and acquiescence of the parties in past amendments. In this light we agree with the district court that the agreement of the parties (including any terms necessarily implied as a result of established past practices and working conditions) is not reasonably susceptible to the CNW's proposed interpretation whereby it has the right to unilaterally extend its operating rules to regulate off duty use, possession, or sale of illegal drugs in the manner contemplated by the amendment to Rule G.[5]

Thus, we hold that the CNW has failed to meet its "relatively light burden" of showing that the pre-amendment agreement of the parties, including both express and implied terms, is reasonably susceptible of being interpreted to allow the amendment to Rule G the CNW seeks to implement unilaterally. *See Brotherhood of Mainte-*

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[5] The CNW additionally contends that because it has retained the right to unilaterally amend Rule G since its inception, the status quo imposed pursuant to 45 U.S.C. § 156 must also include that right. The district court rejected this contention. On the basis of our rejection of the CNW's assertion that any implied term must include the absolute power to amend Rule G unilaterally, we affirm the district court in this regard.

nance of Way Employees, Lodge 16, 802 F.2d at 1022. The district court correctly concluded that the action represents a major dispute in which it could issue a status quo injunction pursuant to 45 U.S.C. § 156.[6]

IV

As a final matter, the CNW argues that the district court exceeded its jurisdiction by entering an order that enjoins enforcement of Rule G against any of the CNW's employees, not just against employees represented by the BMWE. Since the BMWE did not seek to enjoin the CNW from enforcing Rule G as amended against any parties other than those it represents, the district court's order, shall be amended to enjoin enforcement of Rule G only against those represented by the BMWE.

Accordingly, as modified by part IV of this opinion, the judgment and order of the district court are affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[6] In so holding we note that this case comes to the Court on appeal from a grant of a preliminary injunction. In the present posture of the case our review is limited to the record before the district court at the time it issued the preliminary injunction.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

FOURTH DIVISION

Civil Case No. 4-86-575

BROTHERHOOD OF MAINTENANCE, OF WAY EMPLOYEES, CHICAGO AND NORTHWESTERN SYSTEM FEDERATION,
Plaintiffs,

vs.

CHICAGO AND NORTHWESTERN TRANSPORTATION CO.,
Defendant.

TRANSCRIPT OF PROCEEDINGS had before the Honorable James M. Rosenbaum, on the 23rd day of September, 1986, in Minneapolis, Minnesota, commencing at 2:00 o'clock p.m.

* * * *

[27] THE COURT: The Court as is well known by the parties heard this matter approximately a month ago.

After having read and reviewed the briefs and heard the opening presentation of the Brotherhood of Maintenance of Way Employees, the Court prevailed upon Mr. Glennon as counsel for Northwestern Transportation Company and on Mr. McClow to avail themselves of an opportunity to try and resolve these matters between themselves.

The Court then and the Court again today indicated that these are matters of much gravety, and matters of great interest. At the same time issues of concern, however great, cannot be taken to provide a means whereby orderly procedures may be circumvented.

With those thoughts in mind it was then and remains today a matter of concern and the Court hoped that

reasoned opponents could resolve things in a fashion both more amicable and in many cases more expeditious than the judicial process. The parties for reasons best known to themselves and as to which the Court makes no inquiry have found that they were unable to resolve these [28] matters and so the issues are squarely framed for the Court's attention.

The Court has considered the arguments of counsel and considers the late submissions of the union only for the purpose of validating the dates which the Court understood had been in effect and acknowledged previously, the Court again has been able to obtain the agreement and concurrence of counsel for the railroad which indicate that the dates were not significantly questioned and those dates are that there was an effort to promulgate an amendment to Rule G on April 27, 1986.

At a time subsequent thereto but prior to June 20, 1986, the Plaintiff Brotherhood took informal steps which did not acknowledge the existence of the newly promulgated or newly offered rule but brought to the attention of the railroad their claim that it was of significance. It had not been an affirmatively agreed upon rule.

The event concerning Mr. White, however, unquestionably took place well after the notice to the railroad that there would be a challenge to Rule G as promulgated on April 27th.

The event of interest regarding Mr. White took place on June 20, 1986.

[29] The Court having the arguments of counsel, these facts, the affidavits appended to the briefs and the briefs in mind the Court determines that the Plaintiff's motion for a preliminary status quo injunction is granted.

The Defendant's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted is denied.

This Court determines that it has subject matter jurisdiction over the action, the Federal Courts have jurisdiction over injunction actions to preserve the status quo

between parties in a major dispute. This was set forth in a number of places but the Court would indicate Missouri Pacific Joint Protective Board versus Missouri Pacific Railroad 730 F 2nd 533, an Eighth Circuit case, and Independent Federation of Flight Attendants versus Trans World, et cetera, that's 650 F2d 155, also an Eighth Circuit case.

A major dispute is one arising out of the formation or change of collective agreements covering rates of pay, rules, or working conditions, which principle is elucidated in Detroit and Toledo Shore Line Railroad Company versus United [30] Transportation Union, 396 U.S. 142, particularly on 145 in the footnote number seven.

Further, of course, I could cite the same Missouri Pacific and Flight Attendant cases previously noted.

A dispute over working conditions which does not arise out of a collective bargaining agreement as was acknowledged again today in oral argument may still be characterized as a major dispute subject to a status quo injunction so long as it arises out of actual, objective working conditions which have achieved the level of established practice and custom, once again Detroit and Toledo and Flight Attendants.

For a working condition to have achieved that level of establish practice and custom the conduct of the parties must encompass a continuity, interest, purpose and understanding which elevates a standard course of action to an implied contractual status, once again citing Flight Attendants.

In this case, the union protests the railroad's unilateral change, on April 27, 1986, of Rule G. This new rule regulates intoxicants used by—or this rule regulates intoxicant use by [31] Employees. The union asserts that the rule as changed regulates for the first time an Employee's off duty conduct and no longer allows an employee's personal physician to determine whether prescription medicines affect his ability to safely perform his duties.

The Court determines and finds that this constitutes a major dispute. Although Rule G is not a part of a collective bargaining agreement, it does regulate employee intoxicant use and has done so for a sufficient period of time with the knowledge and acquiescence of both the Company and union to become in reality a demonstrable part of the actual working conditions at Chicago and Northwestern. See here Detroit and Toledo.

Since the grievances at issue grew out of a formal change to Rule G rather than out of an interpretation or application of that rule the grievance is a major dispute and the Court has jurisdiction to hear the Plaintiff's motion for a status quo injunction. Cite there would be Elgin versus Burley, 325 U.S. 711, 1945.

Major disputes must be resolved according to the notice, negotiation, and mediation procedures outlined in the Railroad Labor Act, 45 [32] U.S.C. 151, et. seq. While the Act's remedies are being exhausted, the status quo regarding the working conditions at issue must be maintained, citing again both Detroit and Toledo.

The question here is what is the status quo regarding the Railroad's regulation of the employee intoxicant use. The Railroad maintains that it has unilaterally changed Rule G without objection by the union on a number of times since it's inception in 1910 and as such the status quo is that the Company may unilaterally change the rule during the dispute settlement procedures outlined by the Railway Labor Act.

The Court concludes that the characterization of the status quo and Rule G is not reasonably—is not a reasonable interpretation, cited the United Transportation Union versus Burlington Northern at 458 F 2nd 354.

Since 1910 the Railroad has unilaterally regulated employee's intoxicant use while on duty, subject to duty, or on company property, all under Rule G. The Railroad has never regulated the off duty conduct of an employee while away from company property until the change in Rule G, which it unilaterally promulgated April 1986.

[33] Therefore, the Court concludes that Rule G prior to it's change in April of 1986 constitutes the status quo regarding the company's regulation of employee intoxicant use and that the status quo prior to April 27, 1986, is and must be maintained throughout the parties exhaustion of the settlement procedures mandated by the Railway Labor Act.

The Court finds it unnecessary and declines to rule regarding the status quo as to who has the power to determine whether prescription medicines affect an Employee's ability to safely perform his duties, whether it is his own personal physician or the company's physician. This is based on the affidavit of Doctor Thomas Cook and the Defendant's memorandum. In that memorandum and affidavit the Railroad indicates that, to the Court, that the new rule G has made no change in the status quo. The Court takes the Railroad at it's word.

Finally, since the Railroad's unilateral change of rule G, or since the Railroad unilaterally changed Rule G without following the dispute resolution procedures of the Railway Labor Act and since the company's unilateral change of [34] Rule G changed or upset the status quo, the company's discharge of Mark White, pursuant to Rule G as they have amended it on their own, is improper and must be rescinded. This is made both because of the fact of the Rule G change, which the Court has determined unlawfully changed the status quo—or, I'm sorry, wrongfully changed the status quo, and secondly because the Union's grievance was not a gerrybuilt procedure designed to try to institute or reinstitute the employment of it's brother, the Court determines that the schedules presently asserted by the Court and agreed to by the parties are an indication that the challenge to Rule G well predated Mr. White's purported transgressions.

On that basis, therefore, Mark White must be reinstated with back pay from the date of his discharge. The Court makes it clear that by this ruling it makes no determina-

tion regarding Mr. White's allege involvement in criminal activity.

Further, the Court makes no ruling in any regard as to whether or not any other applicable work rule may be applied or have been applied such that Mr. White might otherwise have been terminated from the service of the Railroad.

Further, by this ruling the Court [35] does not preclude the Railroad from discharging Mr. White in accordance with the provisions of rule G in the form of the status quo, if applicable, or in accordance with any other provisions of any agreement among the parties.

Lastly, the Court's ruling does not prevent the Company from discharging Mr. White at the end of the settlement procedures outline by the Railway Labor Act if Rule G is changed to contemplate such discharge. The Court simply would reserve the last since the issue is in no regard ripe and makes no determination at this time.

With this guidance in mind the Court directs the Plaintiff to prepare an order for preliminary injunction. It is so ordered. We'll be in recess.

(Recess)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-86-575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, AND CHICAGO AND NORTH WESTERN SYSTEM FEDERATION, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

[Filed Oct. 7, 1986]

ORDER

The above-entitled matter came on for hearing before the Court on August 14, 1986, and September 23, 1986, upon the motion of plaintiffs Brotherhood of Maintenance of Way Employes, and Chicago and North Western System Federation, Brotherhood of Maintenance of Way Employes for a preliminary injunction and upon defendant Chicago and North Western Transportation Company's motion to dismiss the complaint, pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Roger J. McClow, Esq., Klimist, McKnight, Sale & McClow, P.C., Southfield, Michigan, and William Garber, Esq., Peterson, Engberg & Peterson, Minneapolis, Minnesota, appeared for and on behalf of plaintiffs. Edward M. Glennon, Esq. and Thomas E. Glennon, Esq., Lindquist & Vennum, Minneapolis, Minnesota, appeared for and on behalf of defendant.

Based upon the parties' respective motions, memoranda, supporting affidavits, arguments of counsel, the files, records, proceedings and factual stipulations, and for the reasons stated on the record, the Court finds that defendant violated the status quo provisions of the Railway Labor Act by, on April 27, 1986, unilaterally implementing a new Rule G that applies to off duty conduct, and that Michael White was thereafter dismissed pursuant to that Rule. Therefore, IT IS ORDERED that:

1. Plaintiffs' motion for a preliminary injunction is granted, and defendant's motion to dismiss the complaint is in all respects denied.

2. Defendant, its officers, employees, agents, servants, and all those in active concert or participation with defendant, are preliminarily enjoined from enforcing Rule G as promulgated by defendant on April 27, 1986, until such time as defendant complies with Section 6 of the Railway Labor Act, 45 U.S.C. 156.

3. Defendant's termination of Michael White, pursuant to the terms of Rule G as promulgated on April 27, 1986, is hereby rescinded and he is hereby restored to his former position with full back pay from the date of his removal from service, but without prejudice to any action which may be otherwise available to the defendant pursuant to any Railroad or work rules or regulations in effect prior to April 28, 1986.

4. This preliminary injunction shall be effective upon the plaintiffs' filing with the Clerk of this Court a bond pursuant to Rule 65(c), Federal Rules of Civil Procedure, in the amount of $5,000.

Dated: October 7th, 1986

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-86-575

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, and CHICAGO AND NORTH WESTERN SYSTEM FEDERATION, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

ORDER

This matter is before the Court on defendant's motion to reconsider the grant of a preliminary injunction on October 7, 1986. Defendant further seeks a stay of the injunction pending reconsideration. Based on the files, records and proceedings herein, the Court denies both of defendant's motions and reaffirms its October 7, 1986, order.

The Court, today, specifically considers the recent decision in *Brotherhood of Maintenance of Way Employees, Lodge 16, et al. v. Burlington Northern Railroad Company*, Nos. 85-2360, 85-2412 (8th Cir. October 1, 1986). The Court finds its reasoning inapposite in the present case.

In *Burlington Northern*, the company invoked new drug testing procedures in order to implement its existing Rule G, which regulated intoxicant use by employees while on duty. (This is not the Rule G to which challenge

is made in the case at bar.) The Eighth Circuit found that the use of new chemical testing procedures constituted only a minor change in working conditions. As such, the appellate court found that these testing changes could be implemented unilaterally by the company.

In this case, Chicago and North Western Transportation Company (CNW) also has a Rule G which regulates employee intoxicant use. The rule was in place up to April 27, 1986. The rule was changed by CNW, unilaterally and without notice, on April 27, 1986. As changed, it purports to regulate, for the first time, employee intoxicant use or possession while off duty and not subject to duty or on company property. This change goes far beyond the "minor change in working conditions" challenged in the Eighth Circuit's recent *Burlington Northern* case. The Rule G amendment under challenge here would allow CNW to discharge an employee when that employee posed absolutely no threat to the safe operation of the railroad.

The safe operation of the railroad is of primary concern to defendant. It is so now and was so in 1910, when the railroad first enacted the predecessor to Rule G. But this concern for safe operation must be differentiated from the company's regulation of an employee's off duty conduct when that employee is neither subject to duty nor near company property. This new effort at lifestyle regulation, without first affording the employee the notice, negotiation, and mediation procedures outline in the Railway Labor Act, 45 U.S.C. 151, *et seq.*, constitutes an impermissible invasion into the private lives of CNW employees.

Therefore, the Court previously concluded, and today affirms, that CNW's unilateral change of Rule G on April 27, 1986, constitutes a major change in working conditions. Such a change requires the use of the Railway Labor Act procedures before it can be implemented.

Until those procedures are exhausted, the status quo, pre-April 27, 1986, Rule G, remains in effect. See, 45 U.S.C. 156.

In its reconsideration motion, the Railroad fervently argues that it has traditionally regulated employee off-duty conduct through Rule 7, known as the "conduct unbecoming" rule, as well as through various other company rules. It is clear, of course, that only Rule G was before this Court when considering the underlying motion for a preliminary injunction. Simply put, the propriety of the company's regulation of off duty conduct by means other than Rule G is not at issue in this case. The Court made this clear in paragraph 3 of its October 7, 1986, order, when it excluded its consideration of any rule or working condition save Rule G and expressed no opinion concerning any other railroad work rule or regulation.

For the reasons set forth above, in the October 7, 1986, order, and at the August 14, 1986, and September 23, 1986, hearings, IT IS ORDERED that:

1. Defendant's motion for reconsideration is denied.

2. Defendant's motion for a stay pending reconsideration is denied.

Dated: October 16th, 1986

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5403MN

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,
Appellees,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Appellant.

Appeal from the United States District Court
for the District of Minnesota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration of the premises, it is adjudged and decreed that, as modified by part IV of this opinion, the judgment and order of the district court are affirmed.

August 25, 1987

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5403MN

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,
Appellees,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Appellant.

Appeal from the United States District Court
for the District of Minnesota

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

November 13, 1987

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Eckehard Muessig, Referee

Award Number 25032

Docket Number CL-25158

PARTIES TO DISPUTE:

Brotherhood of Railway, Airline and Steamship Clerks

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood (GL-9750) that:

1. Carrier violated the Agreement Rules, particularly Rule 21, when it dismissed Mr. R. E. Rhodes from its service, and,

2. Carrier shall now be required to return Mr. Rhodes to its service with all rights unimpaired and compensate him for all lost time including compensation for any and all fringe benefits he has been deprived of under any group health, dental and life insurance plans now in effect for clerical employes on this property.

OPINION OF BOARD:

The Claimant was dismissed from the service of the Carrier, after investigation, on the finding that his conduct was unbecoming an employee, by being in the possession of marijuana and L.S.D. and selling marijuana to two youths on September 4, 1981.

While the Board is not unmindful of the Organization's assertions, in its advancement of this claim, we find that Carrier has met its burden with respect to the charges. This Division has held on numerous occasions that deal-

ing in drugs is a serious matter that may result in numerous adverse consequences with respect to the health and safety of Carrier's employes and the public. Given the facts of record, there is no proper basis for interfering with the discipline imposed by the Carrier, and the claim is denied.

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of Third Division

Attest: /s/ Nancy J. Deyer
NANCY J. DEYER
Executive Secretary

Dated at Chicago, Illinois this 26th day of September 1984.

No. 87-1348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a court may enter a preliminary injunction to restrain a carrier from unilaterally changing working conditions in violation of the status quo requirements of the Railway Labor Act without applying the traditional equitable standards used in actions between private parties.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1348

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF FACTS

Prior to April 24, 1986, the Chicago and North Western Transportation Company (CNW) had never regulated, under its Rule G, employee alcohol and drug use while off duty and off company property. (J.A. 67).[1] There had been a Rule G in place since at least 1953. Over that period of time, there had been one minor change in the Rule itself. In addition, in the early 1970's, the CNW had implemented a Rule G (Addition) which regulated the use of prescription medicine while on duty. (J.A. 24-29).

[1](J.A. —) indicates page citations to the Joint Appendix.

On April 27, 1986, the CNW unilaterally implemented a new Rule G which expressly prohibited off duty drug use, sale or possession. (J.A. 30). The Brotherhood of Maintenance of Way Employes (BMWE) represents track maintenance employees of the CNW. In a letter to the CNW of May 27, 1986, Stan Waldeier, the General Chairman of the Chicago and North Western System Federation of the BMWE, confirmed his earlier verbal protest of the unilateral change in the rule. (J.A. 89-90).

On June 17, 1986, maintenance of way employee Michael B. White was arrested by civil authorities in Minnesota for alleged possession of marijuana. At the time, White was off duty. (J.A. 98). On June 18, 1986, White's wife informed his supervisor at CNW, R. J. Lewis, of his arrest for drug possession. (J.A. 97). On June 19, 1986, White telephoned Lewis and told him of his arrest. Lewis told White to return to work the next day. (J.A. 98). Lewis then contacted CNW's Assistant Division Manager — Engineering who told him to remove White from service because of "our new Rule G." (J.A. 98). Based on this rule, White was suspended pending an investigation when he came to work on June 20, 1986. (J.A. 97). The CNW thereafter sent White a notice of the investigation which specified the charge as "your responsibility for violation of Rule G . . . effective 4/27/86." (J.A. 92).

The next day, June 21, 1986, White voluntarily submitted to a urinalysis drug screen through his personal physician. (J.A. 105). The test results were negative. (J.A. 112).

The hearing on the charges against White was held on July 22, 1986. (J.A. 95). At the hearing, Lewis conceded that White was off duty when the alleged violation of the new Rule G occurred. (J.A. 98). He admitted that, after being informed of White's arrest for drug possession, he told White to return to work. (J.A. 98).

On examination by the General Chairman Waldeier, Lewis testified about the difference between the "new" and the "old"

Rule G. According to Lewis, the difference was contained in the last paragraph of the new Rule which Lewis then read into evidence as follows:

> It's the last paragraph of the new Rule G. It says, "the illegal use, illegal possession or illegal sale of any drug by employees while on or off duty is prohibited." (J.A. 98).

Donald Mundth, CNW's Inspector of Police at St. Paul, introduced the criminal complaint filed against White.[2] He then testified that the charges filed against White by civil authorities would violate the last paragraph of the new Rule G even though White had not been adjudicated guilty of the charge. (J.A. 100). CNW officials then questioned White about his knowledge of the new Rule G. White testified that he had not been issued a new Timetable or Book of Rules. (J.A. 102). R. F. Erwin, CNW's Trainmaster, then asked White to read the new Rule G into the record and asked him if the charges against him would constitute a violation of the new Rule. (J.A. 102-103). No independent evidence that White had possessed drugs was introduced. White denied the charges. (J.A. 103).

Following the investigation, White was discharged effective July 25, 1986 for "violation of Rule G, as contained in Timetable No. 8, effective 4/27/86. . . ." (J.A. 91).

In the meantime, on July 18, 1986, the BMWE had filed an action for status quo injunction and, on July 28, 1986, moved for a preliminary injunction. (J.A. 2).

The CNW filed a Motion to Dismiss, supported by the August 1, 1986 Affidavit of Ronald Cuchna, Vice President of Labor Relations for the CNW. In this Motion, CNW's position was that it has unilaterally changed its drug and alcohol rules five times over a 76 year period and therefore, past practice

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[2] According to the complaint, about two ounces of marijuana had been found under the seat of the car White was driving. The car was registered in the name of his wife. (J.A. 109).

entitled it to continue to change working conditions without interference from the union.[3]

At the initial hearing on August 14, 1986, the court heard arguments on the BMWE's Motion for Preliminary Injunction and on the CNW's Motion to Dismiss. The court listened to arguments from counsel on what was basically an undisputed set of facts. During CNW's argument, the trial court suggested that the parties attempt to negotiate a settlement of the dispute and scheduled a continuation of the hearing for September 23, 1986.

When the hearing reconvened, the trial court did not permit the BMWE to introduce evidence through oral testimony.[4] Instead, he developed the record through stipulations of counsel, through answers of counsel to pointed questions and on the basis of submitted documents. These documents included the existing and "new" Rule G, BMWE's letter protesting the unilateral change, copies of former CNW rules regulating drug and alcohol conduct, the Affidavit of Cuchna and the transcript of the investigation hearing of Michael White.

The trial court asked counsel for CNW if there was any evidence that any employee had ever been disciplined under

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[3]This position was supported by Cuchna's statements in the Affidavit, which were clearly hearsay, that the CNW's drug rule had been unilaterally changed by the CNW in 1929, 1953, 1967, 1975 and 1980. Cuchna had been with the CNW for 14 years. In their appellate pleadings, the CNW admitted that Mr. Cuchna was wrong about the date and the circumstances of the rule change he said occurred in 1975. In fact, the CNW had changed its rule with respect to prescription drugs in 1971. Following a protest by the United Transportation Union, the CNW modified the rule in 1972 to address the union's concerns. There was no rule change in 1975.

[4]Contrary to the assertion in Petitioner's Statement, BMWE's counsel never "dropped" the request to present additional evidence. In fact, the trial court had read the submission of the parties and was aware of the operative facts. BMWE's counsel informed the court what evidence he intended to introduce. On several occasions, the trial court obtained CNW's stipulation that the documentary evidence was authentic and that the facts were not in dispute. (Tr. 9/23/86, pp. 5-7, 18-22).

Rule G's pre-1953 predecessors for conduct occurring off duty. Counsel answered in the negative. (Tr. 9/23/86, p. 10).

The CNW admitted that it could not have disciplined White under Rule G as it existed prior to April 27, 1986. (J.A. 68). This, of course, was obvious under the circumstances of White's suspension, the facts adduced at the investigation hearing, and the emphasis placed on "our new Rule G" by the CNW at the hearing. (J.A. 93, 94, 95, 96, 97, 98, 100, 101, 102, 103).

The trial court also posed a question to CNW's attorney on whether a situation where an employee "participated in delivering" controlled substances while off duty was covered by any company rule. Counsel answered "I don't believe we ever had a rule as such. . . ." (Tr. 9/23/86, pp. 9-10).[5]

After hearing counsel's arguments, the court made specific findings of fact and concluded that the unilateral and formal change in Rule G to, for the first time, prohibit conduct occurring off duty and off company property, constituted a major dispute. The court then granted BMWE's Motion for a Preliminary Injunction. (Tr. 9/23/86, pp.27-35). In a subsequent telephone conference regarding the amount of the appeal bond, CNW's counsel had difficulty articulating any injury to CNW during the pendency of the action and suggested a nominal bond. (Tr. 9/23/86, pp. 38-39).

On October 7, 1986, after retaining present counsel of record, CNW filed a Motion for Reconsideration. For the first time, CNW argued that its new Rule G was simply a "procedural" codification of its existing Rule 7. Rule 7 had not been mentioned in CNW's Motion to Dismiss, in its supporting Brief, in Cuchna's August 1, 1986 Affidavit or during either of the hearings on the Motion. On October 9, 1986, the Court

[5]Later in the hearing, CNW's counsel pointed out to the court that an employee of the CNW purportedly had been disciplined for selling marijuana to minors off duty and off company premises. A review of the award referenced by counsel revealed no indication that the conduct had been off duty and no indication of the substance of the rule applied. The cited case did not involve an employee of the BMWE.

entered an Order granting BMWE's Motion for a Preliminary Injunction and denying CNW's Motion to Dismiss. On October 17, 1986, the trial court denied CNW's Motion for Reconsideration.

On appeal, in addition to the arguments made to the trial court, CNW argued that injunctive relief was improper because there had not been a showing of irreparable harm. The court of appeals rejected CNW's "past practice"and "codification of Rule 7" arguments. 827 F.2d at 335 and 336. The court also referred to the longstanding precedent in the Eighth Circuit that, when a major dispute exists under the Railway Labor Act, preliminary injunctive relief is mandatory without regard to the equities. 827 F.2d at 33, n.2.

The CNW now petitions the Court for a Writ of Certiorari on the issue of the standard to be applied to such an injunction. The BMWE files this Brief in Opposition.

REASONS FOR NOT GRANTING THE WRIT

The issue raised in CNW's Petition is whether a trial court must apply traditional equitable standards before issuing a preliminary injunction maintaining the status quo as required by the Railway Labor Act. Because the statutory duty to maintain the status quo is central to the Act's design and because it incorporates a Congressional determination that national labor policy would otherwise be undermined, the answer is clearly that traditional equitable principles need not be applied. If federal labor policy is not to be jeopardized, courts must be able to maintain the status quo by injunction without regard to the equitable standards applicable to litigation between private parties.

The status quo provisions of the Railway Labor Act are found in Sections 5, 6 and 10 of the Act, 45 U.S.C. §§ 155, 156 and 160. These provisions, taken together, require that parties to labor agreements who wish to change working conditions first comply with the "detailed" procedures for notice, negotia-

tion, mediation, voluntary arbitration and conciliation set forth in the Act before resorting to self help. *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969); *Elgin J. & E.R. Co. v. Burley*, 325 U.S. 711, 722-25 (1945).

This Court has held that the Act's status quo requirement is central to its design. *Detroit & T.S.L.R. Co. v. United Transportation Union*, 396 U.S. 142, 150 (1969) (*Shoreline*). The purpose of this requirement is to prevent a union from striking and a carrier from doing anything that would justify a strike. The status quo requirement delays the time when parties can resort to self help and provides procedures to foster agreement on issues that might otherwise lead to a disruption of commerce. *Shoreline*, 396 U.S. at 148-50. The "heart of the Railway Labor Act" is the duty to make every effort to reach consensual solutions to work place disputes. *Trainmen v. Jacksonville Terminal, supra*, 394 U.S. at 378.

CNW's argument is that, absent an independent finding of irreparable harm, a court has no power to enjoin violations of the status quo until there has been a final trial on a union's request for permanent injunction. In other words, the CNW asserts that it should be free to ignore the status quo provisions of the Act pending entry of permanent injunctive relief, unless a union can prove irreparable harm to it or its members. Of course, this formulation ignores the Congressional determination that failure of a carrier to maintain the status quo in itself threatens irreparable harm to both public and private interests.

While the Act does not contain any specific civil enforcement mechanisms, this Court realized immediately that, absent equitable relief to enforce compliance with the Act's obligations, the scheme of the RLA would be unworkable. This Court also recognized that Congress, in requiring collective bargaining and adherence to statutory procedures, had made a forceful declaration of the public interest. Thus, in *Virginian Ry. Co. v. System Federation 40*, 300 U.S. 515 (1937), the Court approved of the use of injunctive relief to enforce the mandates of

Section 2 Ninth of the Act, 45 U.S.C. 152 Ninth, that a carrier "treat with" the certified representative of its employees. The Court stated:

> In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that . . . the meeting of employers and employees at the conference table is a powerful aid to industrial peace.
>
> * * *
>
> The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief.

300 U.S. at 551-52.

The Court distinguished an action for equitable enforcement of private rights from an action to enforce the statutory mandates of the RLA:

> More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. Courts of equity may, and frequently do, go much farther both to give and withhold relief in the furtherance of the public interest than they are accustomed to go when only private interests are involved.

300 U.S. at 552.

Thus, the CNW's argument that the traditional equitable principles must be applied to actions for status quo injunctions is clearly misplaced. Congress has already balanced the equities in favor of maintaining the status quo.

In *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), the Court reviewed earlier cases, including *Vir-*

ginian Railway, which had held that injunctive relief was essential for effective enforcement of the Act's mandates. The Court stated:

> In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the "right" of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose.

320 U.S. at 300.

In *Shoreline, supra*, the Court affirmed an injunction requiring a carrier to maintain the status quo pending exhaustion of the procedural obligations of the Act. There is no indication in *Shoreline* that any showing beyond the existence of a major dispute and a violation of the status quo is required for entry of the injunction.

In *Chicago & N.W. Ry. Co. v. United Transportation Union*, 402 U.S. 570 (1971), the Court held that the *Norris-LaGuardia Act*, 29 U.S.C. §101 et seq., does not deprive federal courts of jurisdiction to enjoin a strike, even when the status quo procedures of the Act have been exhausted, if the carrier can show that the union had bargained in bad faith. In dissent, Justice Brennan, joined by Justices White, Douglas and Black, disagreed that an injunction could enter *after* the status quo provisions of the Act had been exhausted. But even the dissent did not dispute that injunctive relief was available when a party refused to initiate the Act's status quo procedures. The dissent reviewed *Virginia Railway* and *Shoreline* and stated:

> While in each of these instances the Court found specific, positive statutory mandates for judicial interference, the underlying cohesiveness of the decisions lies in the fact that in each instance the scheme of the Railway Labor Act could not begin to work without judicial involvement. That is, . . . unless the status quo

> was maintained during the entire range of bargaining, the statutory mechanism could not hope to induce a negotiated settlement.

402 U.S. at 595.

In this case, the CNW argues that there should be a hiatus in bargaining from the date a carrier unilaterally changes working conditions until the judicial process comes to a conclusion. During this hiatus, of course, carriers can raise various defenses, such as the CNW interposed seriatim here, to delay the judicial process. Obviously, CNW's position, if accepted, would undermine the federal labor policy set forth in the Act's status quo obligations. The Congressional mandate will be poorly served if a carrier's compliance with the Act comes only when its legal ingenuity is exhausted. The balance must fall on the side of bargaining, not litigation.

Because job loss, monetary damages or injury to union's status as bargaining representative do not necessarily constitute irreparable harm, a union attacking a unilateral change will often have a difficult time satisfying traditional equitable standards.[6] Of course, the CNW's argument that these standards apply completely misses the point. Congress has already "balanced the equities." It has determined that a refusal to bargain will adversely affect both public and private interests and that the disruptions to commerce resulting from unilateral changes in working conditions will cause serious public harm.

In order for the RLA to serve as an effective means of implementing Congressional intent, courts must have the power to enforce, by preliminary injunction, violations of the status quo without regard to traditional equitable standards. The mandatory duties imposed on the parties under the RLA reflect a specific Congressional determination that failure to comply with the Act's requirements is in itself an irreparable

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[6] *See e.g. Aluminum Workers v. Consolidated Aluminum Corp.*, 696 F.2d 437, 443-44 (6th Cir. 1982).

injury to both public (the danger of interruptions in commerce) and private (denial of employee rights to collectively bargain) interests which the Act is designed to preserve and protect.

The Eighth Circuit Court of Appeals has long recognized that, when a major dispute exists under the Railway Labor Act, preliminary injunctive relief does not depend on traditional standards applicable to private disputes. *Maintenance of Way Employees v. Burlington Northern R. Co.*, 802 F.2d 1016, 1020-21 (8th Cir. 1986); *Airline Pilots v. Northwest Airlines, Inc.*, 570 F.2d 257 (8th Cir. 1978); *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972). Each of these cases dealt with the question of the standard applicable to preliminary, rather than permanent, injunctions.

Other circuits have come to the same conclusion. In *Carbone v. Meserve*, 645 F.2d 96, 98 (1st Cir.), *cert. denied* 454 U.S. 859 (1981), the court stated that, when faced with a request for a preliminary injunction in a major dispute situation:

> A district court may enjoin either party from altering the status quo during the course of the negotiation proceedings with no showing of irreparable harm. (citation omitted).

In *Southern Ry. Co. v. Locomotive Engineers*, 337 F.2d 127, 134 (D.C. Cir. 1964), the court held that a finding of irreparable harm is not a requirement for a status quo injunction because "far more" is at stake "than the private rights and duties of the parties." The court noted that Section 6 rights, which are fundamental to the federal labor policy of preventing disruptions in commerce, are also involved. The court did not distinguish in any way between standards applicable to preliminary as opposed to permanent injunctions.

In *Seafarers v. Board of Trustees*, 351 F.2d 183 (5th Cir. 1965), the trial court reversed the lower court's denial of a preliminary injunction, noting that, when Section 6 rights have not been complied with, the union "and perhaps the National

Sovereign" become entitled to effective judicial relief so that national labor policy will be fulfilled. 351 F.2d at 190.

If the CNW's position were accepted, carriers could unilaterally implement changes and working conditions free from any judicial compulsion until the union could pursue the litigation to its conclusion. Such a situation would hardly maintain the status quo. It would award a carrier's intransigence and its ingenuity in concocting arguments to cloud the legal issues involved. Such a situation would also make compliance with the Act depend on the condition of a trial court's docket and its particularized view of what constitutes irreparable harm or a balance of the equities.

If quick effective injunctive relief is unavailable, the Congressional mandate that the status quo be maintained will be seriously jeopardized. If carriers could unilaterally change working conditions during the pendency of a lawsuit brought by the union with impunity, unions could retaliate by striking.[7] Any other result would give carriers an advantage not envisioned by the RLA. Moreover, such a situation is exactly what Congress intended to prevent by enacting the status quo requirement. *Shoreline, supra*, 396 U.S. at 150, 154. Unless a union can obtain immediate injunctive relief when a carrier makes a unilateral change in established working conditions, the collective bargaining process mandated by the Railway Labor Act will become unworkable.

The only case cited by the CNW as containing conflicting authority is the dicta in *Local 553, Transportation Workers v. Eastern Air Lines*, 695 F.2d 668 (2d Cir. 1982). There, a Second

[7]The irony is that the CNW would certainly argue that preliminary relief enjoining a strike is available without a showing of irreparable harm *to the CNW*. Because economic loss to an employer during a strike cannot constitute irreparable harm sufficient to obtain an injunction, the CNW would undoubtedly point to the harm to the public resulting from the interruptions to commerce. But, this is the irreparable harm that Congress has already factored into the status quo provision of the Act and it applies to requests for injunctive relief by either party.

Circuit panel did not address the issue in the context of the Congressional purpose reflected in the RLA's status quo requirement. In fact, the sole authority cited by the panel, *Jack Kahn Music Co. v. Baldwin*, 604 F.2d 755 (2d Cir. 1979), is *not* an RLA case. Instead, *Jack Kahn* was decided on the basis of the court's traditional and inherent equitable powers to grant injunctive relief. In *Jack Kahn*, the plaintiff sought relief under Section 16 of the Clayton Act, 15 U.S.C. §26, which is entitled "Injunctive Relief for Private Parties." That statutory provision expressly provides for preliminary injunctive relief:

> [u]nder the same conditions and principles as injunctive relief . . . is granted by court of equity, under the rules governing such proceedings, and upon . . . *a showing that the danger of irreparable loss or damages is immediate*. . . . (emphasis supplied).

In *Jack Kahn*, the court was required by statute to apply traditional equitable principles, including the requirement that irreparable harm be imminent. Here, by contrast, the RLA mandates that the status quo be preserved. The Clayton Act, upon which *Jack Kahn* is premised, is not authority that different standards should be applied to preliminary and permanent injunctions in any context, much less in the context of the Railway Labor Act.

The issues involved in determining whether an injunction should be granted when courts are exercising their traditional equitable powers is fundamentally different from the issues involved when a party invokes its statutory right to the preservation of the status quo pending compliance with the mandates of Section 6 of the RLA. *Virginian Railway, supra*, 300 U.S. at 552. Because the Second Circuit's decision in *Local 553, Transportation Workers v. Eastern Air Lines* was premised upon the erroneous assumption that the issues are identical, its decision is fatally flawed. In light of this flaw, it cannot be considered conflicting precedent with the long line of cases from the Eighth Circuit and other circuits.

This Court has long held that specific Congressional policies can be enforced by injunction without the traditional balancing of equities. In *United States v. San Francisco*, 310 U.S. 16 (1940), the Court held that the lower court's entry of an injunction restraining the City of San Francisco from violating a federal act granting it the use of Yosemite Park to generate electricity was proper even though the equities had not been balanced. The Court stated:

> [A]fter consideration of all these objections, we are satisfied that this case does not call for a balancing of equities or the invocation of the generalities of judicial maxims in order to determine whether the injunction should have issued. . . . The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective. Injunction to prohibit continued use—in violation of that policy—of property granted by the United States, and to enforce the grantee's covenants, is both appropriate and necessary. (citation omitted).

310 U.S. at 30-31.

In *TVA v. Hill*, 437 U.S. 153 (1978), the Court held that the district court had erred in balancing the quities in determining whether to enjoin the construction of a dam under the Endangered Species Act. The Court held that Congress had already struck the balance in favor of the endangered species and that injunctive relief was appropriate, and in that case required, when enforcement of that Congressional determination was sought. 437 U.S. at 194.

Of course, as this Court has stated, injunctive relief is not necessarily mandated when a person seeks to enforce Congressional policies. Thus, in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), the Court held that injunctive relief was not absolutely required when there was a technical violation of statutory duties and no danger of recurrence. In *Hecht*, however, there was *no* indication that "balancing of equities" is a requirement

for injunctive relief to enforce statutory Congressional policy.. *Hecht* stands only for the proposition that courts of equity have discretion to withhold relief if, based on the facts, that relief would be ineffective or unnecessary.

In this case, the CNW openly has violated the Railway Labor Act by unilaterally implementing new terms and conditions of employment without first initiating and exhausting the mandatory notice, negotiation, mediation and conciliation procedures of the Act. The CNW has not ceased its violation of the Act. Instead, it continues to openly assert that it has no obligation to bargain with the BMWE. In such a situation, the *only* effective means of enforcing the Act's mandates is a status quo injunction.

To the extent that *Local 553, Transportation Workers v. Eastern Air Lines, supra,* departs from these principles, it was because the court never addressed the issue in terms of the Congressional mandate set forth in the status quo provisions of the RLA. Further, the panel's decision certainly does not reflect Second Circuit precedent in the area.

In *Security and Exchange Comm'n v. Management Dynamics, Inc.,* 515 F.2d 801 (2d Cir. 1975), an action for injunctive relief under the Securities Exchange Act of 1934, the court upheld a preliminary injunction despite the fact that the district court had not found irreparable harm or balanced the equities. The court rejected the argument that such findings were necessary:

> The appellants' crucial error on this score is their assumption that SEC enforcement actions seeking injunctions are governed by criteria identical to those which apply in private injunction suits.

515 F.2d at 808.

The court then reviewed with approval Second Circuit law where that principle had been applied in the context of both permanent and preliminary injunctions. 515 F.2d at 808.

In *United States v. Diapulse Corp.*, 457 F.2d 25, 28 (2d Cir. 1972), a case brought under the Food and Drug Act, the court stated that the passage of a federal statute is, in a sense, an implied finding that violations will harm the public and ought to be restrained if necessary without an independent showing of irreparable harm.[8]

The fact that drug use is involved does not put the issue in a different plane or remove it from the scope of collective bargaining.[9] Drug related issues have an immediate impact on employees. Here, the unilateral change permitted, for the first time, the dismissal of employees under Rule G for alleged off duty drug use. Issues such as this are of critical importance to unions in pursuing their statutory duty of representation. There are a myriad of issues concerning regulation of drug use by employees that can and must be addressed during collective

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[8]Other circuits have come to the same conclusion. *See, e.g., Security and Exchange Comm'n v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984); *Government of Virgin Islands v. Virgin Islands Paving, Inc.*, 714 F.2d 283, 286 (3d Cir. 1983); *Atchinson T. & S.F.Ry. Co. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1981); *Lathan v. Volpe*, 455 F.2d 1111, 1116 (9th Cir. 1971); *Shafer v. United States*, 229 F.2d 124 (4th Cir. 1956).

[9]In her Advice Memorandum CG87-5 of September 8, 1987, Rosemary M. Collyer, General Counsel for the National Labor Relations Board set forth her position that: (1) drug testing for employees and job applicants is a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act; (2) implementation of a drug testing program is a substantial change in working conditions even where physical examinations previously had been given and even if established work rules precluded the use of possessions of drugs in the plant; and (3) established Board policy that a union's waiver of its bargaining rights must be clear and unmistakeable will be applied to drug testing. The CNW's argument that it has an absolute right to change its work rules with respect to drug use is diametrically opposed to the position of the Board's General Counsel. If CNW's argument were accepted, there would be two completely different standards applied under the two labor Acts. *See also Locomotive Engineers v. Burlington Northern R. Co.*, — *F.2d* —, No. 85-4137, (9th Cir., Feb. 11, 1988) (RLA requires parties to bargain over any proposal whose primary impact is the potential loss of jobs, i.e., drug testing).

bargaining so that the interests of the parties and the public can be served.

The CNW's argues that, because the Federal Railroad Administration had recognized the dangers of employee drug use and has imposed certain regulations regarding drug testing, it has no obligation to bargain with respect to drug rules and policies. This argument simply proves too much. While Congress and administrative agencies can remove certain issues from the sphere of bargaining, the ones that remain are for the parties to negotiate. If Congress had decided to preempt the field in this area in the public interest, it would have done so. The areas that are left unregulated are for mutual adjustment by the parties through collective bargaining.

The CNW cannot assume the mantle from Congress as the public's protector, especially at the expense of the bargaining rights of employees. Further, the CNW is absolutely wrong when it states that the Eighth Circuit left the public interest out of the equation. Congress has already decided that negotation between carriers and unions concerning working conditions is in the best interest of the public. *Telegraphers v. Chicago & N.Y. Ry. Co.*, 362 U.S. 330, 338 (1960). As this Court stated in another context in *Secretary of Interior v. California*, 464 U.S. 312, 342 (1984):

The choice between these policy arguments is not ours to make, it has already been made by Congress.

In the face of the CNW's mechanical invocation of the spectre of "irreparable" harm to the public if it is not permitted to violate the Railway Labor Act, it is important to understand the scope of the lower court's injunction and the CNW's position there. The lower court did not enjoin the CNW from enforcing its existing work rules. To the contrary, it specifically held that the CNW could enforce its pre-existing Rule G or any other rule that might be applicable to employee drug use. The CNW is simply required to operate under the working conditions which have been in effect for years with the

agreement and acquiescence of the unions. The CNW lost none of the rights it had prior to its April 26, 1987 implementation of Rule G.

Further, the CNW's arguments before the trial court and the Court of Appeals demonstrate the disengenuous nature of its position. One of CNW's defenses (first raised in its Motion for Reconsideration) is that the new Rule G was simply a "procedural" clarification of its existing Rule 7.[10] If this were true, the injunction would have no effect whatsoever on the CNW's ability to police drug usage of its employees. The CNW cannot have it both ways. It cannot say that it already had the right under Rule 7 to do what it did and then say that irreparable harm may occur if it is enjoined from changing its rules.

The CNW also states that it has been restrained for a year and one half from implementing the new Rule G. In fact, it has only been restrained from enforcing the new Rule G pending the exhaustion of Section 6 procedures. During that year and one half, of course, the CNW could have bargained with the BMWE regarding the propriety of such a rule. Instead, the CNW has steadfastly refused to bargain and has not even attempted to initiate the Section 6 procedures. If the CNW had bargained in good faith with the BMWE, its concerns and the concerns of the BMWE might have been accommodated long before now. Moreover, the CNW might have exhausted those procedures by this time, and had negotiations failed, it would have had the right to unilaterally implement a rule, subject of course, to the BMWE's right to use its economic leverage.

Until Congress sees fit to remove particular subjects from the sphere of collective bargaining, the public interest will be

[10] The Court of Appeals correctly rejected this argument on three independent grounds, one of which was that Rule 7 had a specific requirement that an employee's conduct reflect adversely on the railroad. *See*, 827 F.2d at 335-36.

served by requiring adherence to the mandatory requirements of the Railway Labor Act. Congress has already balanced the equities and has, by statute, determined that irreparable harm will result unless there is compliance with the status quo provisions of the Act. Neither the lower court nor the Eighth Circuit erred in determining that a status quo injunction was appropriate in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

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